

Digital Transactions: Part Three: Assignment 15


Wachter Management Co. v. Dexter & Chaney, Inc. (Kan. 2006)

- Wachter sues DCI, DCI seeks to enforce venue clause in shrinkwrap software license (to bring the Kansas state court suit to the state of Washington)
 - Signed proposal of DCI versus later emergence of shrinkwrap terms from DCI software when delivered and installed
- Applicability of UCC?
- Treat software license terms as attempt to amend the contract
- Groups of cases in opposition
 - Step-Saver, Arizona Retail, Klocek, Orris
 - versus
 - ProCD, Hill v. Gateway, Mortenson v. Timberline
- Which approach to follow?
- Dissenting view . . .

Mortenson Co. v. Timberline Software (Wash. 2000) [_NOT_ASSIGNED_]

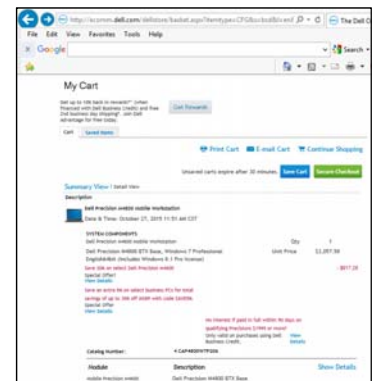
- July 1993 delivery of Precision software product from Timberline via Softworks, its distributor, by Mr. Reich.
 - Medallion -> Bid Analysis -> Precision
- License locations
 - Diskette pouch
 - Manuals
 - Software screen notification of license
 - License around protection device
- December 1993 – less than “precise” bid outcome
- UCC goods?
- K formation or K alteration?
- If K formation, sufficient to meet UCC standard?

James J. White, Contracting Under Amended 2-207 2004 Wis. L. Rev. 723

- “To say that the offeror is the master of his offer means only that he may rule out certain things as acceptance” 
- Discussion about whether amended 2-207 would include specific treatment of terms “on or in the container” with the goods
 - Ultimately dropped
- Industrial buyers and sellers (rounds of negotiation and document exchange) versus sales to consumers
 - “Unlike the industrial buyer who will express himself with his own form and so implicitly reject seller's terms that are not included on his form, our [consumer] buyer makes no explicit or implicit expression of discontent with the seller's terms.”
- Discussion of ProCD case
 - Amended 2-207 might not apply to ProCD facts – differentiates the data versus the medium

Hubbert v. Dell Corp. 835 N.E.2d 113 (Ill. Ct. App. 2005)

- Dell wants to enforce arbitration clause
- Trial court did not enforce it
- Terms in an “I accept” box versus the way Dell displayed the terms containing the arbitration clause
 - Hyperlink
 - Stating on several web pages in the ordering process that the sales are subject to the Terms and Conditions available at the hyperlink
 - Sending a copy of the terms with the computers as shipped



Specht v. Netscape (2d Cir. 2002)

- Arbitration term in downloaded software (SmartDownload) enforceable?
 - Free download
 - What contract terms were formed, if any, via the download?
- Netscape communicator software download required “Yes” click
 - Contained arbitration clause
 - Did not mention SmartDownload
- Differences in downloading SmartDownload from “shareware” site such as ZDNet
- Assent upon downloading SmartDownload from Netscape site?
 - Knowledge of license terms – inquiry
- Relation to shrinkwrap practices?

Assignment Thirteen Problems

- 15.1 to 15.4